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No. 80-1398

in the

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHN DOE, and
MARY DOE,
Petitioners

vs.

WILLIAM GOLDMAN,
HALIM MITRY,
THEODORE I. ANDERSON,
WILFRED BLOOMBERG,
JACK EWALT,
AXEL HOFFER, and
JOHN NELSON
Respondents

Petition for Writ of Certiorari to the
U.S. Court of Appeals for the First Circuit.

REPLY TO MOTION TO DISMISS

Leonard Rose,
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REPLY ARGUMENT - Introduction

The trial court dismissed the complaint as a result of a motion to dismiss filed by the defendants-respondents. Therefore, any review of the facts must be based solely on the allegations of the complaint, construing them most favorably to the plaintiffs-petitioners. Neither the trial court nor the court of appeals did so. Both tended to favor the concept that defendants had the right and power to refuse to give any information to the plaintiffs-parents without using any form of due process in order to exercise that power. Moreover, neither the trial court nor the court of appeals construed the facts most favorably to the parents in order to make a determination of when the parents, as distinguished from the child patient, had been damaged, or when the parents under the circumstances of the case should have been aware that they

themselves had suffered injury. Finally, neither the trial court nor the court of appeals dealt with the issue of giving a favorable construction of the facts where the parents could not obtain definitive advice or opinions from the defendants, where the facts available to the parents were susceptible of many interpretations at the time.

The issue which arose out of the trial court action was whether the plaintiffs had stated a prima facie cause of action under 42 U.S. Code 1983, and whether the motion to dismiss was proper. That issue was timely raised in the trial court by motion (App.27-53,R.96-112) which was denied without opinion (R.114). The issue was preserved on appeal in the briefs, and in the petition for rehearing (App.62) when the court of appeals refused to rule on that question and instead held that there was a statute of

limitations which applied (App.79-80).

This Honorable Court will note that respondents have refused to address this issue in their brief. They have not even referred to the holding of this Court in GOMEZ v. TOLEDO, 446 U.S. (1980), 100 S. Ct. 1920, in their arguments. Obviously, they have no argument to make, and they have tacitly conceded that the trial court was in error to grant their motion to dismiss.

If the trial court's dismissal of the case was improper, under GOMEZ, supra, the case was still ripe for judgment on the merits because of plaintiffs' timely motion for summary judgment and supporting affidavit (R.72-78) on the issue of liability. No counteraffidavits were filed, so the facts alleged by the plaintiffs were not in dispute, and the trial court was bound to rule on all of those facts, as

presented. The only issues were issues of law. The case is still ripe for final judgment on the issue of liability for the same reason. The issues as seen by the respondents are limited to the questions as to whether the action is time barred. Certainly, that question was raised and is among those that should be considered. On the basis of the undisputed facts, however, it is reasonable to conclude that the parents' cause of action was not time barred, and the other more important issues need to be addressed by this Court.

ARGUMENT

Additional Statutes involved.

Mass. G.L.c.123, sections 10 and 11 are not relevant. It is undisputed that JOHN DOE voluntarily admitted his daughter JANE to the Massachusetts Mental Health Center as a minor resident patient, and that she was treated there

for seven months and then voluntarily released by defendants back to the care of her parents. Defendants never raised any issue about any restriction on the release of the child or about the family situation or the parents to whom she returned. The issues in this case all arose after the child had been discharged, when the parents asked for information, advice and guidance from defendants so that they as parents could provide care for the child after discharge. (R.49). JOHN DOE also later asked for various information so that he could act in pending cases (Complaint par.36, R.17; R.49,65) involving JANE's personal interests as her attorney. Sections 10 and 11 are irrelevant.

Respondents have quoted Mass. St.1970, c. 888, sec.4, which inserted G.L. c.123, section 36, as part of Massachusetts law. But this version of the statute <u>was not in effect</u> in 1974, when plaintiff JOHN DOE

sought to enforce it against defendants. The language of G.L.c.123, section 36, had been amended by St.1974,c.348, to make it mandatory that defendants permit JANE DOE to inspect his minor daughter's medical records. The old law made discretionary the matter of inspection by an attorney. Petitioners suggest that the reference to the old statute is improper and irrelevant.

Statement of Pertinent Facts.

Respondents' characterization (R/B8) that

> "Between May, 1973, and November 1974, John Doe made increasingly comprehensive demands upon the Mental Health Center for information about his daughter's condition, treatment, and prognosis."...

is a distortion of the facts of the case, is misleading and unwarranted. The agreed facts are in the Record. They are that the plaintiffs were never given any written reports about the findings, diagnosis, treatment or prognosis in respect to their daughter by defendants. (R.12)

At the same time, plaintiffs informed the defendants that the child was showing all of the same symptoms after discharge that had been the basis of her hospitalization in the first place. (R.49) Plaintiffs were obviously deeply concerned and had an immediate need to know the information that they were requesting. But all that they got from defendants was the basic information that plaintiffs themselves had given to defendants (Complaint pars.19,22, 24 and Exhibit D; R.10-12,51). Respondents' statement suggests no reason for the demands, and makes them appear unreasonable.

Respondents also misstated the facts of this case (R/B 10) by the representation:

> "However, since the validity of the original consent was disputed. ..."

This is a gross misrepresentation of the facts of this case. The undisputed facts are that JANE signed a consent form (R.62) supplied by defendants, which was accepted as a consent form (R.63) by

defendants. The consent was never disputed. Instead, defendants claimed that they had the power to overrule and disregard the consent and the pertinent statute, on the basis of their own discretion. (Complaint pars. 46-50; R.22-23, 65, 66). The Massachusetts Supreme Judicial Court held that defendants did not have that power where there was a valid consent. The original consent existed. The Supreme Judicial Court simply refused to give it effect, nunc pro tunc, because JANE had become of legal age.

Finally, respondents fail to deal with the issue of fact that is undisputed, that all of the efforts of the parents to obtain reports and information were intended to help them care for and prevent injury to JANE, not to themselves. The plaintiffs' injury occurred when they were finally deprived of the parental right to care for JANE while the defen-

dants were still holding to their continuing refusal to help them do so. Plaintiffs' injury occurred later.

Reply to Respondents' Principal Arguments

There are two issues concerning the applicable statute of limitations applied by the court of appeals. Was it the right limitation period, and when did it begin to run? Both depend on the undisputed facts. Construing those facts as they appear in this case, this Court can decide that the relationship between plaintiffs and defendants was contractual, with plaintiffs' damages being consequential but totally foreseeable by defendants, who were professional bound to foresee them. This Court can also decide that the claims arise in tort, and on the facts can decide that plaintiffs were not bound to foresee their own injury resulting from a lost relationship with their child, in which case under Massachusetts law,

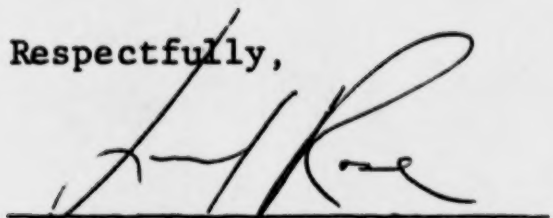
already cited in the petition, the applicable three-year statute of limitations period did not begin to run until 1977, less than three years before they brought their cause of action under 42 U.S. Code 1983. In either case, the limitations period has not yet run, and the defense is not sustainable.

Summation

Most parents do not have the resources to litigate their constitutional rights as parents when they are faced with the power of the State and of State-run hospitals. The parents of minor mental patients are further handicapped by the tremendous task of trying to care for their children while seeking to enforce their rights in order to carry out their responsibilities. This case sets forth major issues clearly; issues which will clarify the constitutional rights of parents, who sorely need that clarification from this Court.

Petitioners pray that their petition may be granted.

Respectfully,



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